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Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 48

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware corporation.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

OPINIONS BELOW.

The decision of the Supreme Court of Wisconsin is reported in 289 N. W. Rep. page 686, but not as yet reported in the official state reports. This decision reverses the judgment of the Circuit Court for Dane County, Wisconsin

in favor of the appellant and remands the case to the Circuit Court of Dane County with directions to enter judgment setting aside the assessment.

The instant case and the case of *F. W. Woolworth & Co. v. Wisconsin Tax Commission,* reported in 289 N. W. 685, and the case of *J. C. Penney Company v. Wisconsin Tax Commission,* reported in 289 N. W. 677, but not as yet reported in the official state reports, were argued together in the Supreme Court of Wisconsin and decided together by the Supreme Court of Wisconsin.

JURISDICTION.

The judgment of the Supreme Court of Wisconsin in the instant case, dated January 16, 1940, holding that as to the respondent, a tax imposed under Chapter 505, Section 3, of the Session Laws of the State of Wisconsin for 1935, as amended by Chapter 552 of the Laws of 1935, was invalid because in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States, and Article VIII, section 1, of the Constitution of the State of Wisconsin; and reversing a judgment of the Circuit Court of Dane County confirming an assessment of privilege dividend tax under said act against the Minnesota Mining and Manufacturing Company as confirmed by a decision and order of the Wisconsin Tax Commission, dated December 19, 1938.

The petition for a writ of certiorari was filed on April 10, 1940, and a copy thereof served upon counsel for respondent on April 17, 1940.

Petitioner urges in its brief a substantial federal question as the only reason for granting a writ of certiorari. This question is whether the state tax involved as applied to the respondent violates the due process clause of the Fourteenth Amendment of the Federal Constitution.

Respondent contests this ground. Its position is that the decision below (1) proceeded upon an independent state ground broad enough to maintain the judgment; namely, that it violated the due process clause of the State Constitution; and (2) that the state court deciding a question, which insofar as it is a federal question, was decided by the Supreme Court of Wisconsin exactly in accordance with the applicable decisions of this court.

ARGUMENT.

I. The Decision Was Based Upon An Independent Ground of State Law.

The appellant ignores the fact that in the instant case the respondent raised the question of the validity of the tax under the Wisconsin Constitution.

In its appeal from the decision of the Tax Commission to the Circuit Court of Dane County the respondent contended among other things as follows; Record p. 18, f. 107:

> "(1) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company and/or its stockholders of property without due process of

law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin, when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin, except the receipt of such dividends as were paid to Wisconsin stockholders."

Record, p. 19, f. 108:

"That even if said law might be held to be constitutional from a jurisdictional standpoint insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the state and/or to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article VIII, Section 1, of the Constitution of the State of Wisconsin, since it would be a denial of equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions."

Record, p. 21, f. 110:

"(3) That said Section 3 of Chapter 305 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company of liberty and property without process of law, in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous other acts within the State of Minnesota. That the

> State of Wisconsin has no jurisdiction to require the Minnesota Mining and Manufacturing Company to do such acts within the State of Minnesota in order to assist it in collecting said tax levied by said section and the amendments thereto."

In the case of *J. C. Penney Company v. Wisconsin Tax Commission,* 289 N. W. 677, 679, on the authority of which the instant case was decided, the Supreme Court of Wisconsin stated:

> "The plaintiff contends that this law as applied to a foreign corporation doing business as plaintiff does business is invalid for the reason that it deprives the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment to the constitution of the United States, U. S. C. A., and Art. VIII, sec. 1, of the constitution of the state of Wisconsin. * * *"

The fact that the provisions of the state and federal constitutions may be similar does not justify this court in disturbing a judgment of a state court which adequately rests its application upon the provisions of its own constitution. That the state court may have been influenced by the decisions or reasoning of this court makes no difference. The judgment of the state court upon its constitution remains a judgment which this court is without jurisdiction to review; it would be immaterial whether in the instant case the tax was repugnant to or consistent with the Federal Constitution if repugnant to the Wisconsin Constitution. If the judgment of the Supreme Court of Wisconsin is that the tax violated the Wisconsin Constitution it should stand. Nowhere in its decision in *J. C.*

Penney Company v. Wisconsin Tax Commission, 289 N. W. 677, does the Supreme Court of Wisconsin affirmatively state it is holding the tax invalid because it violates the due process clause of the Federal Constitution.

In *Lynch v. Pierson* (1934), 293 U. S. 52, 55 S. Ct. 16, there was involved a validity of including income from real property in Ohio as part of the income of a resident of New York in computing her income tax return, and the Court stated (p. 53):

> "* * * The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the state of New York and under the Fourteenth Amendment of the Constitution of the United States. The Appellate Division of the Supreme Court, Third Department, annulled the determination of the state tax commission, Pierson v. Lynch, 237 App. Div. 763, 263 N. Y. S. 250. That court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the state affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533, 189 N. E. 684), and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the nonfederal ground of the application of the Constitution and laws of the state. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * *"

There were similar holdings in *Honeyman v. Hanan,* (1937), 300 U. S. 14, 57 S. Ct. 350, and *City of New York v. Central Savings Bank in the City of New York,* (1939), 306 U. S. 661, 59 S. Ct. 790.

Since the Supreme Court of Wisconsin has not affirmatively determined the instant case under the due process clause of the Federal Constitution and the court had before it precisely the same question under the State Constitution and determined against the validity of the statute in question, there is nothing for this court to do in any event but affirm the judgment. *State of Minnesota v. National Tea Company,* (1940), 60 S. Ct. 676. The state ground of decision was independent and controlling and review by this court would be moot, and no proper occasion for certiorari is presented.

II. The Federal Question Was Decided by the Supreme Court of Wisconsin in Accord With the Applicable Decisions of this Court.

Even if the decisions below were not based upon an independent ground of state law, the federal question involved here has been settled by the Supreme Court of Wisconsin in accord with the applicable decisions of this court.

In *State ex rel. Froedtert Grain and Malting Company, Inc., v. Tax Commission,* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the Supreme Court of Wisconsin was passing on the validity of an excise tax imposed upon the stockholders of a domestic corporation for declaring and paying a dividend within the state of Wisconsin, and what it said in reference to the stockholders of a foreign corporation was mere dicta.

In the *Froedtert* case the court in its dicta as to foreign corporations and its stockholders, therein disregarded the corporate entity, and laid down rules not in accord with the decisions of this court in *Rhode Island Hospital Company v. Doughton,* (1926), 270 U. S. 69, 46 S. Ct. 256, *First National Bank of Boston v. Maine,* (1932), 284 U. S. 312, 52 S. Ct. 174, and *Klein v. Board of Supervisors,* (1930), 282 U. S. 19, 51 S. Ct. 15.

In the *Froedtert* case the court in its dicta as to foreign corporations and its stockholders laid down rules as to constructive situs not in accord with the decisions of this court in *Connecticut General Life Insurance Company v. Johnson,* (1938), 303 U. S. 77, 58 S. Ct. 436, *Newport Company v. Wisconsin Tax Commission,* (1935), 219 Wis. 293, 261 N. W. 884 (certiorari denied by United States Su-

preme Court, 56 S. Ct. 598), *Rhode Island Hospital Trust Company v. Doughton,* (1926), 270 U. S. 69, 46 S. Ct. 256, *Peoples Tobacco Company v. American Tobacco Company,* (1918), 246 U. S. 79, 38 S. Ct. 233, and *Cannon Manufacturing Company v. Cudahy Packing Company,* (1925), 267 U. S. 333, 45 S. Ct. 250.

In the *Froedtert* case the court in its dicta as to foreign corporations and its stockholders laid down rules on the theory of devolution of income not in accord with decisions of this court in *Louisville Gas & Electric Company v. Coleman,* (1928), 277 U. S. 32, 48 S. Ct. 423, *Hopkins v. Southern California Tel. Company,* (1928), 275 U. S. 393, 48 S. Ct. 180, and *Concordia Fire Insurance Company v. Illinois,* (1934), 292 U. S. 535, 54 S. Ct. 830.

In the *Froedtert* case the court laid down rules as to the immateriality of upon whom the tax falls not being in accord with the decision of this court in *Heiner v. Donnan,* (1932), 285 U. S. 312, 52 S. Ct. 358, and *Schlesinger v. Wisconsin,* (1926), 270 U. S. 230, 46 S. Ct. 260.

In the *Froedtert* case, in its dicta as to foreign corporations and its stockholders as to a trust in favor of the state upon income lawfully removed from Wisconsin for the payment of taxes, the court laid down rules not in accord with the decision of this court in *Connecticut Life Insurance Company v. Johnson,* (1938), 303 U. S. 77, 58 S. Ct. 436.

In the case of *J. C. Penney Company v. Wisconsin Tax Commission,* 289 N. W. 677, and in the instant case, when called upon to squarely pass upon the power of the State of Wisconsin to levy an excise tax upon the act of declar-

ing a dividend by a foreign corporation to its stockholders in a foreign state, after a re-consideration of the foregoing questions, the Supreme Court of Wisconsin modified its position in the case of *State ex rel. Froedtert G. & M. Company, Inc. v. Tax Commission,* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, so as to be in accord with the applicable decisions of this court.

In the case of *J. C. Penney Company v. Wisconsin Tax Commission,* 289 N. W. 677, (680), the Supreme Court of Wisconsin stated:

> "* * * It is agreed on all sides that the tax in question is an excise tax and this court has so held in the Froedtert case. * * *"

In the instant case the Minnesota Mining and Manufacturing Company exercised the right and privilege to declare dividends in Minnesota to its stockholders who exercised their contractual rights to receive dividends by reason of its charter and the laws of the state of its incorporation, Delaware. Wisconsin had the power only to impose an excise tax upon a privilege granted by it or a power exercised within its borders.

In *St. Louis Cotton Compress Company v. Arkansas,* (1922), 260 U. S. 346, 43 S. Ct. 125, where property insured was within state and foreign corporation was authorized to do business therein, in a suit to collect tax on the insurance, the court stated at p. 349 of the U. S. Reporter:

> "* * * This case is stronger than that of Allgeyer in that here no act was done within the State, * * * It is true that the State may regulate the activities

of foreign corporations within the State but it cannot regulate or interfere with what they do outside. * * *"

In *New York, Lake Erie and Western Railroad Company v. Pennsylvania,* (1894), 153 U. S. 628, 14 S. Ct. 952, there was involved a Pennsylvania statute which attempted to impose upon a foreign corporation the duty, when paying interest upon bonds held by residents of Pennsylvania of deducting a certain portion of the interest and paying the same into the state treasury. The interest on the bonds was by their terms payable in the State of New York.

As to the power of the state to make such requirement, the court said at p. 646 of the U. S. Reporter:

"The New York, Lake Erie and Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another state, shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance."

In *Connecticut General Life Insurance Company v. Johnson,* (1938), 303 U. S. 77, 58 S. Ct. 436, the United States Supreme Court stated:

"* * * Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

There are similar holdings in *Louisville & J. Ferry Company v. Kentucky,* (1903), 188 U. S. 385, 23 S. Ct. 463, *Compania General De Tabacos De Filipinas v. Collector,* (1927), 275 U. S. 87, 48 S. Ct. 100, *Farmers' Loan & Trust Company v. Minnesota,* (1930), 280 U. S. 204, 74 L. Ed. 271, 65 A. L. R. 1000, 50 S. Ct. 98, *James v. Dravo Contracting Company,* (1937), 302 U. S. 134, 58 S. Ct. 208, *Provident Savings Life Assurance Society v. Kentucky,* (1915), 239 U. S. 103, 36 S. Ct. 34, 1916C L. R. A. 572, *Rhode Island Hospital Trust Company v. Doughton,* (1926), 270 U. S. 69, 46 S. Ct. 256, and *Wachovia Bank & Trust Company v. Doughton,* (1926), 272 U. S. 567, 47 S. Ct. 202.

Since the Supreme Court of Wisconsin has decided the instant case in accord with the applicable decisions of this court, no proper occasion for certiorari is presented.

In the instant case the State of Wisconsin is seeking to impose an excise tax upon the Minnesota Mining and Manufacturing Company, a Delaware corporation, for the right and privilege of performing the act of declaring dividends

or upon its stockholders for the privilege of receiving dividends declared in the State of Minnesota. All of the cases of this court cited by the petitioner can be readily distinguished from the instant case.

In the case of *American Manufacturing Company v. St. Louis,* (1919), 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522, this court held that an excise tax upon the act of manufacturing within the City of St. Louis, measured by the total value of the goods manufactured, was valid, although the goods subsequently moved in interstate commerce. This is no authority for taxing an act performed without the taxing state.

In the case of *Atlantic Lumber Company v. Commissioner of Corporations and Taxation,* (1936), 298 U. S. 553, 80 L. ed. 1328, 56 S. Ct. 887, this court sustained as valid an excise tax upon the privilege or act of doing an intrastate business in the State of Massachusetts measured by the fair value of the assets employed in Massachusetts to the total assets, less certain deductions. This is no authority for taxing acts performed outside of the State of Wisconsin.

In the case of *Shaffer v. Carter,* (1920), 252 U. S. 37, 64 L. Ed. 445, 40 S. Ct. 221, this court sustained a state income tax upon the act of earning an income in Oklahoma by a resident of Illinois. This is no authority for Wisconsin taxing and act performed by a foreign corporation in the State of Minnesota.

In the case of *Underwood Typewriter Company v. Chamberlain,* (1920) 254 U. S. 113, 65 L. Ed. 165, 41 S. Ct. 45, this court sustained as valid a state franchise tax upon a foreign corporation upon the act of earning an income in the State of Connecticut. Clearly this is no authority for Wisconsin having extra-territorial power to tax acts performed outside its borders.

The case of *Miller v. Milwaukee,* (1927), 272 U. S. 713, 71 L. Ed. 487, 47 S. Ct. 280, is cited in support of the proposition that the corporate entity can be pierced and disregarded. The court in this case was dealing with an attempt by the State of Wisconsin to tax dividends from Wisconsin corporations where the Wisconsin law exempted dividends from income tax if the corporation had paid a tax upon the income, and taxed the dividends if the income to the corporation was exempt—obviously an attempt to tax federal securities in violation of the Constitution of the United States. Judge Holmes stated:

> "There is no doubt that in general a corporation is a nonconductor that cuts off connection between dividends to its stockholders and the corporate funds from which the dividends are paid. Des Moines National Bank v. Fairweather, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191. * * *"

See also: *Eisner v. Macomber,* (1920), 252 U. S. 189, 40 S. Ct. 189; *First National Bank of Boston v. Maine,* (1932), 284 U. S. 312, 52 S. Ct. 174; *Rhode Island Hospital Trust Company v. Doughton,* (1926), 270 U. S. 69, 46 S. Ct. 256; *Beidler, et al. v. South Carolina Tax Commission,* (1930), 282 U. S. 1, 51 S. Ct. 54; *Klein v. Board*

of Supervisors, (1930), 282 U. S. 19, 51 S. Ct. 15; *Owensboro National Bank v. Owensboro,* (1899), 173 U. S. 664, 19 S. Ct. 537; and *Estate of Shepard,* (1924), 184 Wis. 88, 197 N. W. 344; wherein this court has definitely taken the position that the corporate entity cannot be pierced.

The petitioner cites *Barnes v. The Railroads,* (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544, and *Railroad Company v. Collector,* (1879), X Otto (100 U. S.) 595, 25 L. Ed. 647, as authority for the view that the tax imposed by Section 3, Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, was laid upon the corporation and not upon the stockholders, and the petitioner concedes that in the cases of the *United States v. Railroad Company,* (1873), 17 Wall. (84 U. S.) 322, 21 L. Ed. 597, and *Stockdale v. Atlantic Insurance Company,* (1874), 20 Wall. (87 U. S.) 323, this court questioned such interpretation. Such view is not in accord with the following decisions of this court: *Home Savings Bank v. Des Moines,* (1907), 205 U. S. 503, 27 S. Ct. 571, *Merchants' & Manufacturers' National Bank of Pittsburgh v. Commonwealth of Pennsylvania,* (1897), 167 U. S. 461, 17 S. Ct. 829; *Des Moines National Bank v. Fairweather,* (1923), 263 U. S. 103, 44 S. Ct. 23; *United States v. Commissioners of Sinking Fund,* (1898), 169 U. S. 249, 18 S. Ct. 358; *Heiner v. Donnan,* (1932), 285 U. S. 312, 52 S. Ct. 358; and *First National Bank v. Chehalis,* (1897), 166 U. S. 440, 17 S. Ct. 629; and *Oliver v. Washington Mills,* (Mass.) (1865), 11 Allen 268.

The Federal Treasury Department, Bureau of Internal Revenue, I. T. 3002 XV-35-8264 (p. 4), held that the Wis-

consin privilege dividend tax is an excise tax imposed upon the stockholder receiving the dividend.

Assuming for the sake of argument, without conceding, that the instant tax was upon the corporation and not upon its stockholders, the cases cited are not in accord with the view of the petitioner that Wisconsin can tax the Minnesota Mining and Manufacturing Company for its acts performed in Minnesota.

CONCLUSION.

The Wisconsin court held that a tax assessed under Section 3, Chapter 505 of the Laws of 1935, as amended by Chapter 552 of the Laws of 1935, was invalid in the instant case as imposing a tax upon the Minnesota Mining and Manufacturing Company, a Delaware corporation, for the right and privilege of performing an act, to-wit: the declaration of a dividend in Minnesota.

The Wisconsin court called attention to the fact that it was considering the validity of this tax under the due process clause of the Wisconsin Constitution and the Federal Constitution. It does not affirmatively appear that this decision was not predicated upon an independent ground of state law adequate to maintain the judgment. Accordingly this court will not take jurisdiction.

Even were the Federal question controlling, the decision of the Wisconsin court is in harmony and accord with the applicable decisions of this court. There is no occasion for this court to reconsider its former rulings. It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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